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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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09/213,096

12/17/1998

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01/24/2005

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EXAMINER

DUONG, FRANK

ART UNIT

PAPER NUMBER

2666

DATE MAILED: 01/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/213,096

Applicant(s)

KALKUNTE ET AL.

Examiner

Frank Duong

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 27 August 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-8, 21-23 and 25-38 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 21, 25, 32 and 38 is/are rejected.
- 7) ☒ Claim(s) 2-8, 22-23, 26-31 and 33-37 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

1. This Office Action is a response to communications dated 08/27/04. Claims 1-8, 21-23 and 25-38 are pending in the application.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 1, 21, 25, 32 and 38 provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 10, 16 and 19 of copending Application No. 09/271,011.

Application claim 1 calls for:

"A method for *improving receive performance in a data network*, the method comprising:

receiving an indication denoting the *start of frame transmission* of a flow sensitive to out-of-order frame sequences on a corresponding plurality of communication links;

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identifying the start of the flow by analyzing information embedded within at least one received frame;

dedicating a received buffer from a plurality of receive buffers to receive all frames associated with the identified flow; and

assigning a pointer value to each frame for storage within a pointer buffer, each pointer value being based, at least in part, on a relative order in which the indications of start of frame transmissions associated with each frame are received, each pointer value associated with each respective frame being used to preserve a state of frame transmission order according to complete reception of the frame without modifying the respective frame".

'011 application claim 1 calls for:

"A method for preserving frame order across an aggregated link comprised of a plurality of virtual links each supporting a particular transmission rate, the method comprising:

receiving a plurality of indications denoting commencement of frame transmission of received frames on each of the virtual links;

determining if the received frames constitute a flow; and

if the received frames do not constitute a flow, assigning a plurality of pointer values to a corresponding plurality of records in a pointer value buffer associated with each of the virtual links, the assignment of the plurality of pointer values based, at least in part, on a relative order in which data frames are transmitted on each of the virtual links and each of the plurality of pointer values being used to determine an order

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according to complete reception of the frame in which the data frames corresponding to the plurality of pointer values are promoted from a receive buffer for transmission”.

Although the conflicting claims are not identical, they are not patentably distinct from each other because the claimed invention of the instant application encompasses the claimed subject matters of the copending application. Evidence can be found through a comparison of the above claims. The differences between the disputed claims are a mere wording such as *“identifying the start of the flow by analyzing information embedded within at least one received frame”* and *“determining if the received frames constitute a flow”* or the claimed invention is broadened by omitting of certain limitations such as *“if the received frames do not constitute a flow”* and *“in which the data frames corresponding to the plurality of pointer values are promoted from a receive buffer for transmission”*. Such differences are deemed to be obvious to those skilled in the art. Moreover, the subject matter claimed in the instant application is fully disclosed in the referenced copending application and would be covered by any patent granted on that copending application since the referenced copending application and the instant application are claiming common subject matter. There is no apparent reason why applicant would be prevented from presenting claims corresponding to those of the instant application in the other copending application.

The above rationales also applied to claims 21, 25, 32 and 38 by compare them to claims 1, 10, 16 and 19 of copending Application No. 09/271,011.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Allowable Subject Matter

3. Claims 2-8, 22-23, 26-31 and 33-37 objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Response to Arguments

4. Applicant's arguments with respect to amended claims 1-8, 21-23 and 25-38 have been considered and are moot. Thus, the art rejection is overcome. However, the outstanding provisional obvious-type double patenting rejection is maintained because a terminal disclaimer has not been filed.


Conclusion

5. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Frank Duong whose telephone number is (571) 272-3164. The examiner can normally be reached on 7:00AM-3:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Seema Rao can be reached on (571) 272-3174. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A handwritten signature in black ink, appearing to read 'Frank Duong', with a stylized, looping flourish at the end.

Frank Duong
Examiner
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January 21, 2005